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No. 81-32

In the Supreme Court of the United States

OCTOBER TERM, 1980

MOSHER STEEL COMPANY, PETITIONER
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a suit brought to quash an inspection warrant issued under the Occupational Safety and Health Act of 1970 and to suppress evidence that was obtained during the execution of the warrant is moot following the Secretary of Labor's withdrawal of the citation issued as a result of the inspection.

2. Whether the district court should have declined to entertain a suit to quash an executed OSHA inspection warrant and to suppress evidence obtained during the inspection where judicial review of the validity of the warrant is available in the court of appeals as part of the Act's administrative enforcement process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 642 F. 2d 768. The order of the district court (Pet. App. 20a-22a) is unofficially reported at 1979 Occup. Safety & Health Dec. (CCH) para. 23,630.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1981. A petition for rehearing was denied on May 13, 1981 (Pet. App. 26a). The petition for a writ of certiorari was filed on July 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Mosher Steel Company fabricates structural and plate steel at its San Antonio, Texas, plant. On November 27, 1978, compliance officers of the Occupational Safety and Health Administration (OSHA) attempted to inspect petitioner's plant pursuant to an inspection

warrant based on both a general schedule of programmed inspections and employee complaints of unsafe conditions (R.E. 7-8; Pet. App. 5a).[1] They were refused entry (*ibid.*). Two days later the compliance officers returned, accompanied by a United States Marshal, and were permitted to enter, although petitioner's representatives objected to the inspection (*ibid.*). As a result of the inspection, the Secretary, on December 22, 1978, issued a citation charging petitioner with violations of the Act (*ibid.*).[2]

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[1]The Secretary is authorized to conduct administrative inspections of workplaces by Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), which provides:

> In order to carry out the purposes of the Act, the Secretary upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

Pursuant to Section 8(f) of the Act, 29 U.S.C. 657(f), which is set forth at Pet. 2, the Secretary is also required to conduct administrative inspections in response to an employee complaint. This Court has previously examined the Secretary's authority to inspect worksites in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978).

"R.E." refers to the record excerpts in the court of appeals.

[2]The Act provides for an administrative enforcement process followed by judicial review. After inspecting a workplace, the Secretary is empowered under the Act to issue citations to an employer for violation of the Secretary's regulations or the Act's "general duty" clause (29 U.S.C. 654(a)(1)). The citation must specify safety and health violations and fix reasonable abatement times for the correction of these violations, and may propose penalties. 29 U.S.C. 657(a), 658(a), 659(a). Citations that are not contested by the employer within 15 working days

Also on December 22, 1978, petitioner filed this action for declaratory and injunctive relief in the United States District Court for the Western District of Texas, seeking to quash the warrant and suppress the evidence obtained in the course of the inspection (R.E. 2). Petitioner contended that the warrant was invalid on its face because the Secretary's regulations allegedly did not authorize the *ex parte* issuance of OSHA inspection warrants. The Secretary moved to dismiss the action, claiming that the district court lacked jurisdiction because petitioner had failed to exhaust its administrative remedies; the Secretary also argued that both the warrant and the inspection were lawful. Thereafter, on January 17, 1979, petitioner filed with the Secretary a notice of contest to the citations, thereby invoking the jurisdiction of the Occupational Safety and Health Review Commission (the Commission). See note 2, *supra*.

On June 6, 1979, the district court denied the Secretary's motion to dismiss the action and held that the warrant was unlawful because it was "issued *ex parte* at a time when the Secretary of Labor's regulations required that prior notice of the application for the warrant be given to the employer" (Pet. App. 20a).[3] The court accordingly quashed the warrant, permanently enjoined the Secretary from making any

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become final. 29 U.S.C. 659(a). If the employer timely notifies the Secretary of his intention to contest a citation, he is afforded a hearing before an administrative law judge. 29 U.S.C. 659(c), 651(b)(3), 661. The judge's report becomes a final order of the Occupational Safety and Health Review Commission unless a Commissioner directs further review. 29 U.S.C. 661(i); 29 C.F.R. 2200.90. If the employer is not satisfied with the Commissioner's disposition of his claims, he may obtain review of the order in the court of appeals. 29 U.S.C. 660(a). The decision of the court of appeals is reviewable in this Court on writ of certiorari. 29 U.S.C. 660(a); 28 U.S.C. 1254(1). See generally *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 444-447 (1977).

[3]The Secretary subsequently amended his regulations to provide explicitly that he may obtain warrants *ex parte*. See 45 Fed. Reg. 65916 (1980).

use of evidence obtained during the inspection, permanently enjoined all administrative proceedings arising from the inspection, and ordered the Secretary to return to the company all materials gathered during the inspection (*id.* at 21a).

The court of appeals reversed (Pet. App. 1a-19a), holding that if an OSHA warrant has been executed, an employer must exhaust its administrative remedies in proceedings before the Commission prior to contesting the constitutionality of the warrant in judicial proceedings. The court reasoned that requiring exhaustion in such circumstances would avert disruption of the Act's administrative process and would avoid the need for judicial resolution of the constitutional questions if the Commission, for whatever reason, were to resolve the citation proceedings in the employer's favor (*id.* at 6a-9a). In addition, the court concluded that none of the exceptions to the exhaustion doctrine were applicable. It noted that the allegedly improper inspection did not amount to a "blatant" violation of petitioner's constitutional rights and that the availability of judicial review in the court of appeals of any Commission decision would prevent petitioner from suffering irreparable injury as a result of the exhaustion requirement (*id.* at 9a-14a).

As an alternative basis for its decision, the court of appeals held that the district court should have declined to exercise its equitable jurisdiction to entertain the suit, because this case satisfies none of the traditional criteria for the exercise of equitable jurisdiction: petitioner had an adequate remedy at law, there was thus no danger of irreparable injury, and there was also no evidence of a callous disregard for constitutional rights (Pet. App. 14a-19a).

ARGUMENT

1. This case is now moot. In the courts below, petitioner sought only declaratory and injunctive relief to bar the

Secretary from taking administrative action on the basis of evidence obtained during the challenged inspection.[4] On July 24, 1981, the Secretary withdrew the citation issued to petitioner as a result of the inspection, thus effectively granting petitioner all the relief it had sought.

There is accordingly no basis for further review, since there no longer exists " 'a real and substantial controversy admitting of specific relief.' " *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). To avoid mootness, " 'an actual controversy must be extant at *all* stages of review, not merely at the time the complaint is filed.' " *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974) (emphasis added). See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631-634 (1979). Thus, the prospect envisioned by the court of appeals in its ruling on the exhaustion of administrative remedies issue (see Pet. App. 7a-8a, 13a-14a, 18a) has come to pass: the termination of the administrative proceeding has mooted the need for judicial resolution of the constitutional questions arising from the issuance of the warrant. See *FTC* v. *Standard Oil Co. of California*, No. 79-900 (Dec. 15, 1980), slip op. 10; *McKart* v. *United States*, 395 U.S. 185, 195 (1969); *Babcock & Wilcox Co.* v. *Marshall*, 610 F. 2d 1128, 1138 (3d Cir. 1979).[5]

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[4]Petitioner did not seek damages for the allegedly illegal inspection pursuant to this Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Compare *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 8-9 (1978) (holding that plaintiff's claim for damages prevented dismissal on mootness grounds).

[5]This case does not present an issue that is " 'capable of repetition, yet evading review.' " *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). To the contrary, in the three years since this Court's decision in *Marshall* v. *Barlow's, Inc., supra*, the exhaustion issue has been decided by six courts of appeals and is currently pending in two others. See pages 10-11, and note 9, *infra*.

2. In any event, the decision of the court of appeals is plainly correct and does not warrant review. The doctrine of exhaustion of administrative remedies is well established, both in the administrative context generally, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), and in the OSHA context in particular. *Frank Irey, Jr., Inc.* v. *Hodgson*, 354 F. Supp. 20 (N.D. W. Va.) (three-judge court), aff'd, 409 U.S. 1070 (1972); *In re Matter of Restland Memorial Park*, 540 F. 2d 626 (3d Cir. 1976). The court below correctly concluded (Pet. App. 7a) that two of the principal policies behind the doctrine would be served by requiring exhaustion here.

First, an exhaustion requirement protects the autonomy of agency proceedings. Where Congress has "enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965). See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Congress established the Occupational Safety and Health Review Commission as a central forum for adjudication of all citations issued by the Secretary for violation of the Act's safety and health requirements. In creating this enforcement mechanism, Congress struck a balance between the need for swift implementation of abatement orders and the provision of due process protections for affected employers. Interference with this scheme by employers seeking to invoke the powers of the district courts to quash executed warrants "might well sunder the statutory balance," *Babcock & Wilcox Co.* v. *Marshall, supra*, 610 F. 2d at 1140, and "would afford much opportunity for abuse for dilatory purposes, to the detriment and possible disruption of effective law enforcement." *In re Worksite Inspection of Quality Products, Inc.*, 592 F. 2d 611, 616 (1st

Cir. 1979). Accordingly, exhaustion is "required as a matter of preventing premature interference with agency processes." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975).

Second, an exhaustion requirement offers the possibility, now realized in this case, of mooting the constitutional issue. See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772-773 (1947); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 553 (1954). As the court below recognized (Pet. App. 8a), an agency resolution favorable to the employer on the merits of the citation would make the relief sought by the employer redundant and would accordingly obviate the need for a judicial determination of the constitutionality of the warrant. See *Babcock & Wilcox Co.* v. *Marshall, supra*, 610 F. 2d at 1138. Cf. *In re Worksite Inspection of Quality Products, Inc., supra*, 592 F. 2d at 616; *Marshall* v. *Central Mine Equipment Co.*, 608 F. 2d 719, 722 (8th Cir. 1979). This is consistent with the well-settled practice of avoiding constitutional adjudication whenever possible. See *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

Nor do any of the recognized exceptions to the exhaustion requirement apply here. Exhaustion is not required where there is no available administrative remedy, *Greene* v. *United States*, 376 U.S. 149, 163-164 (1964), where the available administrative remedy is inadequate to prevent irreparable harm, *McNeese* v. *Board of Education*, 373 U.S. 668, 674-676 (1963), or where blatant violations of constitutional or statutory rights have taken place. *First Jersey Securities, Inc.* v. *Bergen*, 605 F. 2d 690, 696 (3d Cir. 1979); *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 768 (D.C. Cir. 1972). Here, however, it is clear that the administrative remedy is adequate. Requiring exhaustion will not irreparably injure the employer, because the alleged constitutional violation has already occurred, and because the employer

may obtain complete relief on his constitutional claims in the court of appeals. 29 U.S.C. 660(a).[6] Moreover, the expense of administrative litigation alone does not constitute irreparable harm. *FTC* v. *Standard Oil Co. of California, supra*, slip op. 11; *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 220-222 (1938). Finally, the court of appeals noted (Pet. App. 14a) that the record contains "no evidence of a callous disregard by OSHA officials for the constitutional rights of the compan[y]."[7] For these reasons, the court of appeals correctly held that petitioner was required to exhaust its administrative remedies.

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[6]The availability of judicial review in the court of appeals also defeats the contention that an exhaustion requirement violates the constitutional doctrine of separation of powers. Under the Act, the question "is not *whether* the issues may be heard by an Article III court, but *when*." *Babcock & Wilcox Co.* v. *Marshall, supra*, 610 F. 2d at 1136 (emphasis in original; footnote omitted).

[7]In suppressing the evidence obtained as a result of the inspection, the district court found only that the Secretary had violated his own regulations in obtaining the warrant *ex parte* (Pet. App. 20a). There is, of course, no constitutional prohibition on the issuance of *ex parte* search warrants. See *Marshall* v. *Barlow's, Inc., supra*, 436 U.S. at 320.

The inspection in this case was conducted in furtherance of the Secretary's responsibility for insuring the health and safety of employees in the nation's workplaces and pursuant to a warrant obtained in good faith from the appropriate judicial officer. Petitioner claims (Pet. 5-6) that force was used to gain entry to its plant in that a United States Marshal pushed aside a company representative at the door. The record contains no finding, by either the district court or the court of appeals, regarding the alleged use of force by the marshal, and petitioner does not claim that any OSHA inspector used force in entering the plant. In any event, the fact that the marshal may have used force in executing the warrant does not reflect a "callous disregard" for constitutional rights. It is settled that in executing a search warrant, law enforcement officers may make a forcible entry into the premises after giving notice of their authority and being refused entry. 18 U.S.C. 3109. See *Sabbath* v. *United States*, 391 U.S. 585 (1968). The same rule is generally applicable in the administrative search context. *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967).

The court below was also correct in holding (Pet. App. 14a), as have two other courts of appeals in similar cases, that the district court should in any event have declined to exercise its equitable jurisdiction to entertain the suit. See *Marshall* v. *Central Mine Equipment Co., supra; In re Worksite Inspection of Quality Products, Inc., supra.* A district court's power to consider the admissibility of evidence in a separate proceeding is exceptional in nature; it has been termed the "anomalous" jurisdiction (*Lord* v. *Kelley*, 223 F. Supp. 684, 688 (D. Mass. 1963), appeal dismissed, 334 F. 2d 742 (1st Cir. 1964), cert. denied, 379 U.S. 961 (1965)), and its exercise is subject to equitable restraints. *Hunsucker* v. *Phinney*, 497 F. 2d 29 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975). Thus, as the court of appeals held, a district court should decline to exercise its jurisdiction in the absence of the danger of irreparable injury, the possibility of an inadequate remedy at law, or the existence of a callous disregard for constitutional rights. As discussed above (see pages 7-8, *supra*), none of these prerequisites is met in this case.

3. Petitioner correctly notes (Pet. 11) that the decision below is contrary to the Seventh Circuit's decision in *Weyerhaeuser Co.* v. *Marshall*, 592 F. 2d 373 (1979), but that conflict does not, in our view, provide a sufficient basis for review by this Court. As the court below correctly observed (Pet. App. 7a-8a), the Seventh Circuit in *Weyerhaeuser* plainly erred in concluding that an administrative decision in favor of the employer would not moot the issue of the constitutionality of the warrant. In reaching that conclusion, the Seventh Circuit purported to distinguish between the injury resulting from the citation and the injury resulting from the inspection itself, and held that while a Commission ruling in favor of the employer would relieve the former, it could not moot the latter.

But the relief sought in this case, like that sought in *Weyerhaeuser*, is directed at foreclosing any administrative action based on the fruits of the inspection. The Fourth Amendment injury caused by an unconstitutional inspection is fully accomplished by the inspection itself and can never be repaired. *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Calandra*, 414 U.S. 338, 347-348 (1974); *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965). Hence, as the court below noted (Pet. App. 7a-8a), while there is indeed a distinction between the injury resulting from the inspection and the injury resulting from the citation, the declaratory and injunctive relief sought in cases like the one at bar concerns solely the latter, and any constitutional issue arising from the use of the fruits of the inspection to support the citation is therefore rendered moot by dismissal of the administrative proceedings.[8]

We note that *Weyerhaeuser* was the first court of appeals decision on the question whether a district court is the proper initial forum to review the validity of an executed OSHA inspection warrant. Since the Seventh Circuit's decision in *Weyerhaeuser*, five other courts of appeals, including the Fifth Circuit in this case, have considered the question. Without exception, these courts have rejected the Seventh Circuit's analysis. See *J.R. Simplot Co.* v. *OSHA*, 640 F. 2d 1134 (9th Cir. 1981); *Babcock & Wilcox Co.* v. *Marshall, supra; Marshall* v. *Central Mine Equipment Co., supra; In re Worksite Inspection of Quality Products,*

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[8]The decision in *Weyerhaeuser* was based in part on the Seventh Circuit's belief that no benefit would be derived from requiring exhaustion because the Commission would not rule on the validity of an inspection warrant. 592 F. 2d at 376-377. Since *Weyerhaeuser* was decided, the Commission has in fact passed on constitutional questions relating to the use of evidence obtained pursuant to allegedly invalid warrants (see Pet. App. 11a n.11). Regardless of whether the Commission is authorized to decide these questions, the availability of judicial review prevents the employer from being irreparably injured as a result of being required to exhaust its administrative remedies.

Inc., supra.[9] In light of the uniform subsequent authority rejecting the Seventh Circuit's position, the Secretary intends to request that court to overrule its *Weyerhaeuser* decision.[10] There will be time enough for this Court to consider the issue if the Seventh Circuit declines to overrule *Weyerhaeuser*, or if another court of appeals adopts the Seventh Circuit's position.

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[9]The exhaustion issue is also currently pending in two other circuits. *United States* v. *Cleveland Electric Illuminating*, No. 81-3159 (6th Cir.); *B.B. Anderson Construction Co.* v. *Donovan*, No. 81-1742 (10th Cir.).

[10]The issue is currently pending before the Seventh Circuit in *Federal Casting Co., Chromalloy American Div.* v. *Donovan*, Nos. 81-2026, 81-2103.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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